Gould, Inc., Electrical Components Division *and* International Brotherhood of Electrical Workers, Local Union No. 108, AFL-CIO. Case 12-CA-8262

August 17, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 24, 1979, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions, a brief in support thereof, and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.

Respondent purchased and continued to operate a plant in Tampa, Florida, known as the Efcor Die Casting Operation, Division of I-T-E (hereinafter called Die Cast). The employees employed by Die Cast at this plant were represented by the Union and Respondent continued to honor the existing collective-bargaining agreement. Respondent also operated a plant in Millville, New Jersey, known as the Conductor Fittings Corporation (hereinafter called CFC). In late September or early October 1977, Respondent moved the CFC operation from Millville to Tampa, locating it in the same plant in an area adjacent to the Die Cast operation.

The issues in this case are whether the employees employed by CFC constitute an accretion to the certified Die Cast production and maintenance unit,[1] and whether Respondent violated Section 8(a)(5) and (1) of the Act when it refused to recognize and bargain with the Union as the exclusive bargaining representative of those employees. The Administrative Law Judge, substantially relying upon *Tubing Division, Robintech Incorporated*,[2] and certain numerical calculations which he found pertinent to the Section 7 rights of the alleged accreted employees, concluded that a finding of accretion was not warranted and that, therefore, Respondent did not violate the Act as alleged. Consequently, he also found it unnecessary to decide whether the Union had made a valid and timely bargaining demand. The Administrative Law Judge dismissed the complaint in its entirety.

The General Counsel excepts to certain of the Administrative Law Judge's factual findings regarding factors determinative of the accretion issue; to his reliance upon *Robintech, supra*, which the General Counsel contends is clearly distinguishable; and to his failure to find that regardless of when, if ever, the Union demanded bargaining, accretion took place at the inception of the CFC operation in Tampa, thereby initiating Respondent's obligation to bargain collectively with the Union regarding the alleged accreted CFC production and maintenance employees. Respondent, while in agreement with the Administrative Law Judge's conclusion that no accretion occurred, excepts to his failure to find additionally (1) that the Union failed, for reasons other than futility, to make an effective, proper, and timely demand to bargain on behalf of the CFC employees, and (2) that the Union and the General Counsel are now foreclosed from asserting that Respondent unlawfully refused to bargain with the Union because the Union failed to raise the accretion issue before the Board in a timely fashion.[3]

For the reasons set forth below, we do not agree with many of the factual findings made by the Administrative Law Judge which led him to conclude incorrectly that *Robintech, supra*, is controlling in

[1] On September 8, 1977, the Board conducted a decertification election in Case 12-RD-347 in a unit of "all production and maintenance employees" employed at the Tampa facility. On December 27, 1977, the Board certified the Union as the collective-bargaining representative of the unit employees. Respondent thereafter refused to bargain with the Union, as a result of which the Union filed a charge in Case 12-CA-8042 alleging a refusal to bargain. Thereafter, on July 21, 1978, the Board, in 237 NLRB 66, found that Respondent's refusal to bargain with the Union violated Sec. 8(a)(5) and (1) of the Act. In its Decision, the Board declined to reach or consider the question whether the production and maintenance employees of the alleged "added operation" (CFC) constituted an accretion to the Die Cast certified unit, stating:

> Respondent, however, offered no evidence supporting the alleged expansion in operations, the nature of work performed by these employees, or how their working conditions differ from those of unit employees. Nor is there evidence that any party has sought inclusion of these employees in the unit. Further, no petition seeking clarification of the bargaining unit . . . has been filed. [at 237 NLRB 67, fn. 7.]

[2] 222 NLRB 571 (1976).

[3] Respondent contends that the Administrative Law Judge improperly admitted into evidence, over its objection, G.C. Exhs. 5-10 which are "Employee Change of Status Reports" showing transfers between Die Cast and CFC and within those operations. Respondent contends that after the close of General Counsel's case the only legitimate way for him to supply new evidence is through rebuttal or impeachment and since the subject exhibits either predate or postdate the employment of Personnel Director Donald Moreaut, who testified on Respondent's transfer policy, and do not dispute any evidence presented by Respondent, their admission should have been denied. Inasmuch as the subject exhibits contain evidence relevant to the issues of the case, and since Respondent had every opportunity to explain said exhibits, and did explain them through the former CFC supervisor and foreman, Joseph Latina, we hereby find without merit Respondent's request that the Board not consider said documents.

this case. However, while many of the factors supporting a finding of accretion were present at the start of the CFC operation in Tampa in late 1977, and for some months thereafter, we find that by the date of the Union's bargaining demand in May 1978, the facts had so changed as to render a finding of accretion, and the concomitant obligation to bargain, inappropriate.

Both CFC and Die Cast manufacture various fittings and connectors for use in the electrical industry. CFC's products, made of aluminium or copper extrusion and designed to carry electrical current, are primarily manufactured according to individual consumer specifications. Die Cast's products, manufactured through a die cast process out of zinc pursuant to industry standards, do not carry electrical current. In late September or early October 1977, Respondent closed the Millville plant and relocated the CFC equipment to the Tampa facility, in space formerly occupied by Die Cast equipment.[4] By February 1978, the total complement of 60 CFC machines, including 50 or 52 from Millville, had been installed at the Tampa facility.[5] The products of CFC and Die Cast were unchanged by the move and, as before, marketed by Respondent.[6]

CFC started operations in Tampa using some 23 to 27 operators, all but 7 of whom were then employed by Die Cast.[7] According to uncontradicted testimony, each day the CFC department was staffed by the Die Cast foreman who, after completing his Die Cast assignments, would send from 16 to 20 operators to CFC where they were trained and supervised by the CFC foreman. Because often different employees were sent, the CFC foreman was required each day to train Die Cast operators to run the CFC equipment, a process which took approximately 5 minutes. In late October or early November 1977, from 9 to 16 Die Cast operators were permanently transferred to CFC.[8] After this, Respondent began filling the CFC employee complement with employees hired through newspaper advertisements. No employees were transferred from Die Cast to CFC after late January 1978,[9] when Respondent instituted a "new application procedure," pursuant to which all Die Cast employees were required to fill out an employment application if they wished consideration for employment in CFC.[10]

Both CFC and Die Cast employed production and maintenance employees in primarily the same job classifications and possessing largely the same skills.[11] Employees for both operations were located primarily in the same building where many employees from both operations were in full view of one another during working hours. Die Cast and CFC were not integrated with respect to production, but both operations received support services from the tool room, maintenance department, and warehouse.[12] Employees working in those departments serviced mainly Die Cast or CFC and were on the correspondent payroll. In times of "operation crisis," estimated to be between 5 to 10 percent of the time, toolroom employees on the CFC payroll performed Die Cast work and vice versa. Further, warehouse employees regularly received supplies for both CFC and Die Cast. Both CFC and Die Cast employees had access to the same restrooms and water fountains, punched the same timeclock, and utilized the same lunchroom, albeit at different times. Working conditions as well as benefits were the same for all production and maintenance employees and wages were closely comparable. Payroll records for both operations were

[4] The Administrative Law Judge found that the Die Cast operation occupied somewhat less than one-half of the floor space of the Tampa facility and that the CFC equipment was moved into the vacant portion of the plant. The record clearly establishes, however, that Die Cast equipment was consolidated in order to clear space for the CFC equipment which, after placement, adjoined Die Cast's.

[5] Based on photographs of certain machines produced by Respondent at the hearing the Administrative Law Judge found that Respondent purchased for CFC, large, sophisticated, and expensive equipment "at considerable expense to the Company." There is no evidence, however, regarding Respondent's cost in purchasing the 8 to 10 new pieces of equipment, and aside from 3 duplicate pieces, there is nothing to indicate what equipment Respondent purchased for the CFC operation in Tampa. Further, the photographs relied upon by the Administrative Law Judge were never introduced into evidence by Respondent and are therefore not before the Board for consideration. Accordingly, we are unable to adopt the Administrative Law Judge's finding regarding Respondent's cost in equipping the CFC operation in Tampa.

[6] Twenty percent of CFC's products and all of Die Cast's products are listed in a catalog of "Gould Efcor Electrical Components," dated January 1, 1979.

[7] Seven production and maintenance employees transferred from Millville to Tampa, four on a permanent basis and three on a temporary basis. One of the permanent transfers later became the CFC foreman.

[8] While the testimony concerning the number of permanent transfers made during this period differs from the figures which appear on the charts prepared by Respondent on this subject, it is clear that a minimum of nine Die Cast operators were permanently transferred to CFC by October 31, 1977. According to Respondent's charts, CFC had 16 hourly paid employees on this date.

[9] A chart prepared by Respondent for the hearing shows that on January 31, 1978, of the 64 "CFC hourly employees," 17 had previously worked in Die Cast. While it is impossible to determine from this chart the total number of employees transferred from Die Cast to CFC before implementation of the "new application procedure," it is clear from employee change of status reports in evidence that beyond the 9 to 16 November transfers, at least 4 additional Die Cast employees were transferred to CFC in late January 1978.

[10] This process apparently applied to those actively employed in Die Cast as well as those on layoff status.

[11] While there is evidence that certain CFC equipment requires additional skills to run or operate, we note that the record reflects that only a limited number of employees are capable of using blueprints, gauges, and calipers or to operate the equipment requiring more extensive training. In fact, many similar functions were performed by the machines in CFC and Die Cast, and at least 6 of the 10 types of machines used by CFC require as little as 5 minutes of training to operate.

[12] The certified production and maintenance unit included the toolroom, maintenance department, and warehouse employees.

prepared by the same outside computer service[13] and paychecks were drawn from the same Florida bank under the name of Gould, Inc., Electrical Components Division.

Upon commencement of the CFC operation in Tampa, the responsibilities of the existing plant manager were expanded to incorporate management of CFC. Setup of the CFC operation was coordinated by a marketing agent and a purchasing agent both formerly of Millville. By September 1978, the management hierarchy had been restructured so that Die Cast and CFC each had its own superintendent.[14] The toolroom, maintenance department, and warehouse employees, however, remained separately supervised by individuals who supervised them irrespective of whether they performed work primarily for Die Cast or CFC.

For the first 6 months of CFC's operation in Tampa, control of labor relations matters for the entire Tampa facility was vested in Respondent's division personnel manager based in New York. Thereafter, until the cessation of Die Cast production in mid-April 1979, the administration of all personnel matters and maintenance of personnel records was done by the plant personnel manager.[15] The ultimate decision to hire an employee rested with various shift or department supervisors. The toolroom, maintenance department, and warehouse supervisors hired for both Die Cast and CFC. The superintendents of Die Cast and CFC had authority to discharge employees, subject to review of the plant manager.

Respondent maintained separate financial statements for Die Cast and CFC. Raw materials and supplies were charged to the account of CFC or Die Cast depending upon which operation they were used by. Cost for office supplies, building repairs, and utility bills were shared by the two. Further, for profit-and-loss purposes, the salaries of the toolroom, maintenance department, and warehouse supervisors were split between Die Cast and CFC.

Following the Board's certification of the Union on December 22, 1977, as the collective-bargaining representative of all production and maintenance employees at Respondent's Tampa facility, the Union, on December 28, 1977, demanded bargaining. In a letter dated January 17, 1978, Respondent refused to bargain with the Union on the grounds that, *inter alia*, the Board's decision to overrule Respondent's postelection objections was factually and legally incorrect and the Union's certification was therefore invalid. The CFC operation was not mentioned in Respondent's refusal-to-bargain letter, but sometime in January the Union became aware of the presence of that operation in Tampa. Thereafter, a complaint issued in Case 12-CA-8042, alleging that Respondent had unlawfully refused to bargain with the Union as certified. Respondent, in its answer to the complaint, denied, in part, the appropriateness of the unit and in its May 16, 1978, memorandum in opposition to the General Counsel's Motion for Summary Judgment explained that this denial was based on a concern that the certified unit might be interpreted as including certain production and maintenance employees which it alleged to have recently added to its Tampa operation.

By May 21, 1978, there were 60 hourly employees in the Die Cast operation and 148 hourly employees in the CFC operation. On May 25, 1978, Respondent and the Union held a meeting to discuss Respondent's decision to subcontract the production of certain parts then being made by Die Cast. During this meeting the Union's assistant manager, Bruno R. Bengter, Jr., took the position that since the CFC employees were part of production and maintenance, as described in the original certification, Respondent should move to CFC the Die Cast employees performing the work to be subcontracted, with seniority rights. Respondent's counsel, Peter Zinober, indicated, however, that Bengter's inquiries were not germane to the purpose of the meeting and that the Company did not intend to discuss whether the Union represented the CFC employees. The parties met next on June 22, 1978, at which time they again discussed the impact of subcontracting on the Die Cast employees. Respondent rejected the Union's proposal that people from Die Cast be moved to CFC with their seniority intact, bumping more junior CFC employees if necessary. Respondent indicated that those laid off from Die Cast would be hired in CFC only after they filled out employment applications and then only as new employees.[16]

[13] The computerized payroll records identified by a department number series whether an employee worked in Die Cast or CFC. The record reflects that the identification number for Die Cast is the 500 series and for CFC is the 400 series and that the Administrative Law Judge inadvertently interchanged these numbers. The printout subtotals each job classification within a series, but provides no series totals.

[14] The Die Cast superintendent also functioned as supervisor of the Die Cast production employees, whereas the CFC superintendent had a first- and second-shift supervisor overseeing the CFC production process.

[15] The Administrative Law Judge found that Moreaux is presently personnel manager whereas the record reflects that Moreaux held that position only until December 19, 1978. In January 1979, Jaca DePriest became personnel administrator at the Tampa facility.

[16] Respondent contends that the record fails to support the complaint allegation that on or about June 22, 1978, the Union requested Respondent to recognize it as the exclusive bargaining representative of CFC employees as an accretion to the bargaining unit. While the record is unclear as to whether such a request was made on June 22, it is clear that such a request was made by Bengter on May 25, 1978, and we so find. The claim to representational status implicit in the Union's May 25, 1978, statements could have been more specific and direct; however it is evi-

Continued

On July 3, 1978, the Union filed the instant charges. On July 21, 1978, the Board issued its Decision in Case 12-CA-8042 in which it declined to reach or consider the question whether the production and maintenance employees of Respondent's "alleged 'added operation' constituted an accretion to the certified unit."[17]

Thereafter, in a letter dated July 28, 1978, the Union demanded that Respondent recognize and bargain "in accordance with the certification . . . in Case 12-RD-347" and the Board's decision in Case 12-CA-8042. The letter went on to request that, in connection with bargaining, Respondent furnish the Union with "information reasonably necessary to enable it to meet its responsibilities under the law," i.e., a list of the job classifications utilized at the Tampa facility "including those utilized or employed in the C.F.C. section or department" and a list of all production and maintenance employees at the Tampa operation "including the 'C.F.C.' department or operation" and showing for each employee, his department, current rate of pay, and pay increases.

In the meantime, in July and August 1978, Respondent terminated from 15 to 20 Die Cast employees for lack of work, or 30 percent of the then existing Die Cast employee complement. Thereafter, in February or March 1979, Respondent and the Union bargained about the eventual shutdown of the Die Cast operation in Tampa. The shutdown commenced on April 1 and was completed on April 12, 1979.[18]

dent from Bengter's assertion and accompanying proposal that the Union was requesting Respondent to recognize and bargain with it concerning the CFC employees as part of the unit for which it had been certified. No other construction can be placed on the Union's claim that the CFC employees were part of the production and maintenance unit described in the original certification. Moreover, from Zinober's response, it is clear that Respondent interpreted the Union's statements as a demand for recognition concerning CFC employees. We further find that the Union's May 25, 1978, demand for recognition as bargaining representative of the CFC employees was refused by Respondent. Indeed, Christian Peter Dietrich, then director of personnel for both Die Cast and CFC, did not deny that in either May or June 1978, during negotiations with the Union over other matters, he personally told union representatives that CFC was not part of the same bargaining unit as Die Cast.

[17] See discussion at fn. 2, *supra.*

[18] During these negotiations the parties agreed, as stipulated at the hearing, that:

> . . . as part of the impact settlement reached between the Company and the Charging Party regarding the closing down of the Die Cast operations completely, as to all unit employees, except maintenance and tool and die personnel, die cast seniority would be the basis for hiring into CFC, assuming jobs were available, regardless of one's experience in die cast, except that maintenance and tool and die personnel would not be subject to plant seniority rule and were entitled to be transferred to CFC operation after the shutdown of the die cast operations, without having to go through hiring—which was in effect a new probationary period which the other employees had to go through.

The parties further stipulated that his "impact settlement agreement" is not to be construed as an admission or used to compromise any party's legal position in any pending litigation. On March 29, 1979, the sole employee to be transferred pursuant to the "impact settlement agreement" was transferred from Die Cast to CFC.

Discussion

An accretion, as the term has been employed by the Board and the courts, is merely the addition of new employees to an already existing group or unit of employees.[19] In determining whether a new facility or operation is an accretion, the Board has given weight to a variety of factors including integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, and interchange of employees.[20] In the normal situation some elements militate toward and some against accretion, so that a balancing of them is necessary. Where the new employees are found to have common interests with members of an existing bargaining unit and would have been included in the certified unit or covered by the current collective-bargaining agreement an accretion is found to exist.[21] However, where a group of new employees numerically overshadows the existing certified unit and may constitute a separate or independent appropriate unit, the Board is "cautious" to find that the new employees are part of the existing unit since such a finding would deprive the larger group's employees of their statutory right to select their own bargaining representative.[22] In such cases the Board must balance the right of employees to select a bargaining agent against the concomitant statutory objective of maintaining established stable labor relations.

The General Counsel contends that an accretion occurred soon after commencement of the CFC operations in Tampa. Lending support to this contention are the following facts: When CFC was moved to Tampa in September 1977, Die Cast was a fully ongoing operation; the two operations had common ownership, were part of the same corporate division, and shared the same facility; both operations produced electrical components using employees in similar job classifications and having essentially the same skills; during the first few months of CFC operations Die Cast employees were used on a daily basis to staff the CFC operation; both production departments were serviced by the same support departments which were

[19] *N.L.R.B.* v. *Food Employers Council, Inc., et al.*, 399 F.2d 501, 502-503 (9th Cir. 1968).

[20] *Pilot Freight Carriers, Inc.*, 208 NLRB 853, 858 (1974); *The Great Atlantic and Pacific Tea Company (Family Savings Center)*, 140 NLRB 1011, 1021 (1963).

[21] *The Great Atlantic & Pacific Tea Company, supra.*

[22] *Renaissance Center Partnership*, 239 NLRB 1247 (1979); *Bryan Infants Wear Company*, 235 NLRB 1305, 1306 (1978); *Melbet Jewelry Co., Inc. and I.D.S.—Orchard Park Inc.*, 180 NLRB 107, 109 (1969); *Worcester Stamped Metal Company*, 146 NLRB 1683, 1685-86 (1964).

staffed by employees who initially were part of the Die Cast operation and were members of the bargaining unit; labor relations were administered and controlled centrally and both employee complements received common benefits and were subject to the same terms and conditions of employment; both operations came under the same supervision at higher management levels, and, at the outset of CFC operations, the Die Cast operators who ran CFC equipment were under the supervision and instruction of the CFC supervisor; the number of hourly employees in Die Cast substantially outnumbered the number of hourly employees in CFC.[23]

However, even in the early phases of the CFC Tampa operation there were factors militating against accretion as well. More important, the Union's demand for recognition as collective-bargaining representative of the new employees did not occur until more than 6 months after the alleged accretion. Many of the factors initially supporting accretion had by that time dissipated or dramatically changed. These factors lead us to reject the General Counsel's contention that Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union. Thus after CFC commenced in operations Tampa, the support department employees began servicing either Die Cast or CFC almost exclusively and separate contributions to the salaries of the support department supervisors were made by Die Cast and CFC. Respondent established separate firstline supervision of Die Cast and CFC only a month after the CFC operation began. Hiring decisions for Die Cast and CFC rested with the respective shift or department supervisors and firing decisions rested with the respective superintendents, albeit subject to review of the plant manager. The above-discussed employee interchange which took place during the first few months CFC was operational ceased by the end of January 1978. Thereafter, no Die Cast employees were transferred to CFC. In fact, after January 1978, all employees hired for the CFC operation, including those who had previously worked for Die Cast, were hired as new employees.[24] Further, and significantly, by the Union's May 25, 1978, bargaining demand, there were 148 hourly CFC employees and only 60 hourly Die Cast employees. The number of employees the Union desired to add to the certified unit at that time thus overshadowed that existing unit by more than two to one. And the same or a greater ratio of CFC to Die Cast employees continued thereafter until April 1979 when the Die Cast operation terminated.

Consequently whatever indicia of accretion existed at the inception of CFC's Tampa operations are counterbalanced by subsequent events demonstrating the separate identity of Die Cast's and CFC's respective operations. The favorable ratio of Die Cast to CFC employees that initially obtained was reversed after a relatively short period of time. This shift in the comparative sizes of the two operations, together with the development of separate lines of organization and supervision, and the concurrent phasing out of Die Cast and the resulting diminution of its employment complement outweigh the elements which briefly favored a finding of accretion.

In view of the foregoing, we conclude that the issue of whether the CFC employees constituted an accretion to the Die Cast unit must be determined on the facts that existed on the date of the Union's demand. To focus instead, as the General Counsel urges, on the situation at the beginning of CFC's Tampa operation would be to ignore the Union's failure to assert its representative status at that time. Thus, an accretion finding at the point urged by the General Counsel would be premature. More importantly, to hold that an accretion existed at the inception of the CFC operation in Tampa in the circumstances of this case would result in denying to the CFC employees their statutory right to select their own bargaining representative.[25] Thus, a finding of accretion at the time of the Union's demand clearly would be inappropriate.

[23] On these facts we must find the Administrative Law Judge's reliance upon *Robintech, supra*, misplaced. In *Robintech*, the Board found no accretion where the employer, after totally discontinuing its existing copper tube operation, established at the same plant a new industry to manufacture a new product requiring considerable new capital investment and plant modifications. From its inception the new industry operated under a new plant manager with separate supervision at higher management levels. The Board found a contrary result was not required by the fact that the new industry was located on the same premises, that some of the production and maintenance employees represented by the Union were transferred to the soon to be expanding operation, and that there was continuity of firstline supervision. Here, as noted above, CFC and Die Cast were operated concurrently; Respondent did not establish a new industry, but rather expanded the line of electrical components manufactured at the Tampa facility using predominantly existing equipment; and, other than equipment relocation, there is no evidence that plant modifications were required.

Member Fanning adheres to the views set forth in his dissent in *Robintech, supra*. In that case he would have found—based on an evaluation of the facts as of the critical date—that an accretion existed. Also, in this case, he believes that, upon commencement of the CFC operation in Tampa, the relevant factors favored finding an accretion to the existing unit. However, he agrees with the reasoning of this opinion that a finding of accretion must be based on the facts as they exist on the date of the Union's demand for recognition. Further, for the reasons set forth in this opinion, Member Fanning finds there was no accretion as of the date of the Union's demand.

[24] There is no evidence, nor is there any contention, that the transfer of the CFC operation to Tampa, the hiring of former Die Cast employees to CFC as new employees, or the later phasing out and closing of the Die Cast operation were actions taken to avoid bargaining with any union.

[25] In this regard, we note that, at the time the General Counsel asserts an accretion occurred, CFC was operating with a relatively small number of employees in proportion to the size of the complement it employed when the Union demanded recognition and bargaining.

Accordingly, we find that Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as the collective-bargaining representative of the CFC employees on and after May 25, 1978.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.[26]

[26] We have dismissed the instant complaint because we find there has been no accretion and not because we find merit to Respondent's contention that, because the Union and the General Counsel were aware of the CFC operation and failed to raise the issue of accretion before the Board in Case 12-CA-8042, they are foreclosed from asserting in a separate proceeding that Respondent unlawfully refused to bargain with the Union. To the contrary, there is no evidence that the Union at any time expressed in clear and unequivocal terms a waiver of its rights under the certification to represent the CFC employees. E.g., *Hunt Brothers Construction, Inc.*, 219 NLRB 177 (1965). Following Respondent's refusal to bargain with the Union as the certified representative of the Die Cast unit employees, and during the pendency of Case 12-CA-8042 which involved a challenge by Respondent to that certification, the Union filed the instant charge. It would therefore have been premature for the Board to determine in that proceeding whether an accretion, a later addition to the bargaining unit, had occurred when the Union's certification in the original unit was still at issue. Further, Respondent urged the Board in that case not to construe the original certification as encompassing the CFC production and maintenance employees, but, aside from a bald assertion that the CFC employees did not share a community of interest with those in Die Cast, provided no evidence pertinent to the question whether an accretion existed. The Board thus refused to consider or pass upon the question of whether the alleged operation constituted an accretion to the certified unit. In so doing, the Board left open to Respondent the various avenues traditionally taken to resolve such questions without further delaying the statutory rights of the Die Cast production and maintenance employees to collective bargaining through their certified representative. Respondent never requested reconsideration of the Board's decision and does not allege that it was in any way harmed by the fact that the accretion issue was not disposed of in Case 12-CA-8042.

DECISION

STATEMENT OF THE CASE

JOHN P. VON ROHR, Administrative Law Judge: Upon a charge filed on July 3, 1978, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12 (Tampa, Florida), issued a complaint on January 18, 1979, against Gould, Inc., Electrical Components Division, herein called Respondent or the Company, alleging that it had engaged in certain unfair labor practices violative of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer denying the allegations of unlawful conduct in the complaint.

Pursuant to notice, a hearing was held before me on July 23, 24, and 25 and August 1, 1979. Briefs were received from the General Counsel and Respondent on September 7, 1979, and they have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Delaware corporation with an office and place of business located in Tampa, Florida, where it is engaged in the manufacture of electrical fittings and components. During the 12 months preceding the hearing herein, Respondent shipped goods and materials valued in excess of $50,000 from its Tampa, Florida, facility directly to points located outside the State of Florida. It is conceded, and I find, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 108, herein called the Union or the Charging Party, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

Solely involved in this case is an accretion issue, the basic circumstances of which are as follows: Respondent has various manufacturing divisions, two of which are involved in this case. Originally, one operation was located in a plant at Tampa, Florida, the other in a New Jersey plant. Each produced different products. The employees of the Florida plant were represented by the Charging Party, those of the New Jersey plant by a different labor organization. Respondent decided to move the New Jersey division to the Florida facility and not long thereafter decided to phase out and close the Florida division. During the period when the Florida facility was in the process of phasing out, but while still engaged in the manufacture of its products, the New Jersey division commenced its manufacturing operations in an adjacent area of the same Florida plant. When the Florida division was finally and completely closed down, the New Jersey operation took over the entire plant. The ultimate issue presented is whether the New Jersey division became an accretion to the Florida division for collective-bargaining purposes. Respondent having refused to recognize the Charging Party for the alleged accreted unit, the complaint charges Respondent with an 8(a)(1) and (5) violation.

B. *Background*

During the period initially material hereto, Respondent Gould, Inc., Electrical Components Division, purchased and continued to operate a plant in Tampa, Florida, engaged in the manufacture of die cast electrical fittings known as the Efcor Die Casting Operation, a division of I-T-E. The employees in this plant were represented by the Charging Party and Respondent continued to honor the existing collective-bargaining agreement. The appropriate unit designated in this contract included produc-

tion, secondary assembly, packing, die casting, maintenance, toolroom, and setup employees.

Following a second rerun decertification election held on September 8, 1977, in Case 12-RD-347, the Board on December 22, 1977, certified the Union as the collective-bargaining representative of Respondent's employees in a unit comprised of all production and maintenance employees employed at Respondent's Florida plant, exclusive of office clerical employees, guards, and supervisors as defined in the Act.

Thereafter Respondent, on the ground that the Board improperly overruled its objections to the election in Case 12-RD-347, refused to recognize and bargain with the Union. Following the issuance of a complaint by the General Counsel, the Board issued a Decision and Order on July 21, 1978,[1] in which it found that Respondent had violated Section 8(a)(1) and (5) of the Act and directed Respondent to recognize and bargain with the Union pursuant to the certification in the representation proceeding. Refusing to comply with the Board Order, Respondent filed a petition to review with the U.S. Fifth Circuit Court of Appeals, whereof at the present the appeal is still pending.

C. *The Facts*

Electrical Components Division of Gould, Inc., is engaged in the manufacture and marketing of several product lines. The Tampa plant, referred to hereinafter as Die Cast, was engaged in the manufacture of conduit products for the construction industry. These products were not designed to carry electricity. A second plant, known as Conductors Fitting Corporation, hereinafter called CFC, was located in Millville, New Jersey, where it was engaged in the manufacture of fittings that conducted electricity.[2] The production and maintenance employees of this plant were represented by the Distributive Workers of America, District 65.

While details will be discussed later, it is preliminarily noted that the Die Cast operation occupied somewhat less than one-half of the floor space of the Tampa plant. Respondent at some point having determined to relocate the CFC operation, this operation was finally moved from New Jersey to Tampa where it occupied the vacant portion of the Tampa plant. Ultimately, as will be noted, the Die Cast operation was entirely phased out and CFC took over the entire plant.

CFC commenced its operations at the Tampa plant in late September or early October 1977. The Die Cast operation was not closed until April 12, 1979, which gave rise to a period of about 6 months when the two operations were being simultaneously conducted. Accordingly, I turn to a consideration of the various factors relevant to the accretion issue which existed from the commencement of the CFC operation to the closing of the Die Cast operation.

As indicated, the CFC operation was moved into one-half of Respondent's main Tampa plant immediately adjacent to the Die Cast operation. Although there was a wall, open at the top, which separated the majority of the two groups of employees, the Die Cast spinner employees were stationed on the side of the wall adjacent to CFC and thus were in full view of CFC. The CFC employees and the Die Cast employees utilized the same restrooms and water fountains. Although lunch breaks were taken at different times, both groups used the same lunchroom. Similarly, both groups used the same timeclock, although the cards were segregated in the timecard racks for CFC and Die Cast employees. With respect to supervision, a single plant manager supervised both operations, but beneath him supervision was separate for the Die Cast and the CFC employees.

Donald Moreaux, the current personnel manager of CFC, first assumed that position when he came to the Tampa plant on March 20, 1978. Moreaux testified that, prior thereto, Die Cast did not have a personnel manager, that personnel matters were handled by "several different people." Upon the assumption of his duties, Moreaux set up a personnel office which administered personnel matters and maintained personnel records for both Die Cast and CFC. This arrangement continued until Die Cast was finally closed down.[3] With respect to hiring, all applications were filed with and screened by the personnel office. However, the ultimate decisions with respect to hires were made by the respective CFC and Die Cast supervisors. Decisions with respect to discharges were similarly made. Except for isolated instances at the inception of the CFC operation in Tampa, there was no transfer of employees between the two divisions.

The payroll and the issuing of paychecks to CFC and Die Cast were handled by a computer service center. Payroll checks bore separate identification numbers—a 400 series for Die Cast and a 500 series for CFC. Separate accounts were charged with payroll expenditures for tax purposes.

CFC and Die Cast employees received the same company benefits, including insurance and vacation packages. Die Cast employees, however, received incentive bonuses for piecework which CFC employees did not receive.

Maintenance and toolroom support for Die Cast and CFC was housed in a common shop area. Specific employees, however, were separately designated as CFC or Die Cast support service employees. Each operation also had separate toolcribs. Although there were occasional crossovers in the maintenance of machines, it was estimated by William Theisen, the plant manager since 1976, that the toolroom and maintenance people worked within the designated operation for which they were hired—CFC or Die Cast—about 90–95 percent of their time.

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[1] *Gould, Inc., Electrical Components Division*, 237 NLRB 66 (1978).

[2] A third plant of Respondent's Electrical Components Division, not involved in this proceeding, is located in Farmingdale, New York.

[3] Concerning the personnel functions which he performed during this period, Moreaux testified:

> Well, attendance programs, discipline, as far as interpreting policy, for both sides; personal contact, as far as meeting with the different people on the floor and talking with them, listening to what they had to say, as far as problems and working with them, through their supervisors, individual supervisors.

I turn now to a comparison of the products, machinery, and manufacturing operations of the two divisions, including the function of the employees in connection therewith, prior to the close of the Die Cast operation. As previously indicated, Die Cast manufactured conduit fittings which do not carry electricity. Aside from the foregoing, the Die Cast products were made exclusively from zinc which was melted down in die casting furnaces, whereas the CFC products are primarily made from aluminum, copper, and steel which are received from the outside vendors and which come in preshaped 10–12-foot metal bars. The Die Cast products were built to industry standard and were not varied to individual customers, whereas 80 percent of CFC products are manufactured pursuant to individual customer specifications. There was no collaboration between Die Cast and CFC to produce a composite or combined product; i.e., no product moved between the two operations at any stage of manufacture.

The only identical machines utilized by Die Cast and CFC were punch presses, of which Die Cast had 3 or 4 and of which CFC has 14. CFC has 60 machines, of which 50 or 52 were shipped from the New Jersey plant, the others having been purchased as new equipment.[4] The new machines utilized by CFC, none of which were included in the Die Cast operation, included the Holomatic, the Emand, the screw machine, and the Malaya. They were purchased at considerable cost to the Company.[5] I do not deem it necessary to detail the voluminous testimony concerning the nature and functions of these machines. Suffice it to note that the new machines, as the evidence reflects, are more complex and sophisticated than the Die Cast machinery. Additionally, more training is required for the operators and setup men of these machines. Such training varies from a period of a few weeks to several months for some of the operators and even longer periods for the setup men. Certain CFC production employees are also required to be able to read blueprints in the performance of their jobs, which was a nonexistent factor at Die Cast. Likewise, they received training in the use of gauges, calipers, and other measuring equipment. However, and apart from the fact that additional skills are needed to operate the CFC machines, the training of the employees is done by CFC supervisory personnel and the work is still regarded as production and maintenance work.[6]

I have heretofore considered such relevant factors pertaining to the accretion issue as integration of operations, proximity of operations, similarity of operations, skills and functions of employees, a comparison of machinery, control over labor relations, and collective-bargaining history. I now turn to equally relevant factors concerning this issue such as interchangeability of employees, the number of employees sought to be added to the unit, and the number of employees absorbed into CFC from the unit of Die Cast employees.

Preliminarily, the record reflects that Respondent's conduct in transferring the CFC operation from New Jersey to the Tampa plant, as well as its phasing out and closing the Die Cast operation, was motivated solely for economic reasons. There is no evidence, indeed there is no contention, that either action was taken to avoid bargaining with the respective Unions. It is also noteworthy that Respondent bargained with the Charging Party with respect to the effects of the closing of the CFC operation. Although it appears that the Union sought to have the Die Cast employees transferred to CFC without restriction, beginning in or about January 1978, all Die Cast employees, with the exception noted below, were required to file new applications with CFC with the understanding that if hired they would lose their seniority and start as new employees. At the hearing, the parties further stipulated as follows: "That, as part of the impact settlement reached between the Company and the Charging Party regarding the closing down of the [D]ie [C]ast operations completely, as to all unit employees, except maintenance and tool and die personnel, die cast seniority would be the basis for hiring into CFC, assuming jobs were available, regardless of one's experience in [D]ie [C]ast, except that maintenance and tool and die personnel would not be subject to plant seniority rule and were entitled to be transferred to the CFC operation after the shutdown of the [D]ie [C]ast operations, without having to go through hiring—which was in effect a new probationary period which the other employees had to go through."[7] However, as respects the stipulation with respect to the transfer proviso in this stipulation concerning the Die Cast maintenance and tool-and-die personnel, the record reflects that only one such employee was transferred to CFC from Die Cast.

Respondent submitted data in a table form, compiled from original company records, for the monthly periods between September 30, 1977, and June 30, 1979. These show the complement of Die Cast employees, the complement of CFC employees, the number of CFC employees who had previously worked in Die Cast, and the applicable percentages. This data, which I view as highly relevant to the issue herein, are set forth in table form as follows:

[4] Plant Manager Theisen testified that about 25 percent of the machinery of the Die Cast operation was sold and that about 50 percent of it was scrapped.

[5] Although the record does not disclose the cost, photographs of these machines were produced during the hearing. From the photographs it was readily apparent that these were large, sophisticated, and expensive pieces of equipment.

[6] Testimony of Plant Manager Theisen. I have considered the testimony of two General Counsel witnesses concerning their short, temporary assignments from Die Cast to CFC at the commencement of the CFC operations. However, this testimony is not sufficiently representative of the overall picture to warrant further discussion.

[7] Apart from the tool-and-die personnel, as I understand the stipulation, and as brought out in other parts of the record, upon application and assuming jobs to be available, the Die Cast employees were to be hired in CFC as new employees without carrying over their Die Cast seniority. However, the Die Cast employees were to be given preferential hiring status over that of outside applications.

Date	*Die Cast Hourly Empl.*	*CFC Hourly Empl.*	*Total CFC Hourly Empl. Who Prev. Worked Die Cast*	*Percent*	*Total CFC Hourly Never Worked Die Cast*	*Percent*	*Total*
9/30/77	79	7	2	29	5	71	86
10/31/77	92	16	9	56	7	44	108
11/30/77	83	46	14	30	32	70	129
12/22/77	85	71	16	23	55	77	156
12/31/77	94	73	16	22	57	78	167
1/31/78	104	64	17	27	47	73	168
2/28/78	89	91	23	25	68	75	180
3/3/78	72	97	23	24	74	76	169
4/30/78	58	116	31	27	85	73	174
5/31/78	60	148	32	22	116	78	208
6/22/78	48	152	32	21	120	79	200
6/30/78	55	159	32	20	127	80	214
7/3/78	54	154	33	21	121	79	208
7/28/78	39	160	36	23	124	77	199
7/31/78	45	162	36	22	126	78	207
8/31/78	33	150	36	24	114	76	183
9/30/78	32	136	39	29	97	71	168
10/31/78	37	121	29	24	92	76	158
11/30/78	41	123	28	23	95	77	164
12/31/79	42	118	28	24	90	76	160
1/31/79	40	113	27	24	86	76	153
2/28/79	41	111	26	23	85	77	152
3/31/79	39	113	28	25	85	75	152
4/30/79	--	107	31	29	76	71	107
5/31/79	--	104	31	30	73	70	104
6/30/79	--	101	28	28	73	72	101

D. *Additional Facts; Conclusions*

The complaint alleges it to be on or about June 22, 1978, that the Union requested Respondent to recognize it as the exclusive bargaining agent for the CFC employees. Respondent asserts, among other contentions, that at no time did the Union make a valid or timely demand for bargaining for the CFC employees. As to the date named in the complaint, June 22, this has reference to a bargaining meeting held on or about that date, at which time the parties were bargaining concerning the impact upon the employees that were being displaced because of certain work which Respondent was subcontracting out at the time.[8] According to union representative Bruno Bengter, Jr., during this meeting he asked Respondent's representatives that "these people be moved into CFC because they were part of production and maintenance as was described in the original certification." Respondent responded, he testified, that they were not there to discuss this matter and they would not discuss whether the Union represented the CFC employees. Apart from the foregoing, the Union's attorney, by letter dated July 28, 1978, formally requested that Respondent bargain with the Union "in accordance with the certification of the Union in Case 12-RD-347, and the Board's decision in Case No. 237 NLRB No. 16." It is the General Counsel's contention that, in view of Respondent's refusal to comply with the Board's Order in the latter proceeding, it would have been futile for the Union to make any further demand with respect to the CFC employees.

With regard to all the foregoing, I find it unnecessary to decide whether or not the Union made a valid or timely demand upon Respondent that it be recognized as bargaining agent for the CFC employees. Rather, the record is amply developed on the merits and I shall proceed to decide the case on that basis.

I am in agreement with Respondent that the instant case is largely governed by the Board's Decision in a substantially analogous case, *Tubing Division, Robintech, Incorporated*, 222 NLRB 571 (1976), wherein the Board refused to accrete a group of employees into a defunct bargaining unit. Borrowing freely from the correct summation in Respondent's brief, the facts and holding in the latter case are as follows:

The original unit in *Robintech* consisted of a contractual unit of "all employees." The employees in this unit were engaged in operations involving the manufacture of copper tubing and packing and shipping operations. In 1974, the employee complement was approximately 115 employees. The company then decided to locate a plastic siding operation at the original plant in part because the plant building could be adapted with modifications to the siding operation. Top management was transferred in for the new operation. The plant then had two divisions, a plastic siding division and a copper tubing division, with division managers and one overall general manager. In January 1975, the company began installing equipment for the plastic siding operation, utilizing maintenance employees represented by the union from the original copper tubing bargaining unit on the same premises as the copper tubing division. New and different manufacturing equipment had to be installed because of the differences in the two manufacturing operations. New job classifications were set up for the new manufacturing operation. Twelve maintenance men from the copper tubing operation were then told they could be transferred to the plastic siding operation temporarily, or laid

[8] An earlier meeting on this subject was held on or about May 25, 1978.

off. Ten of those copper tubing unit employees did in fact transfer to the new operation in May 1975 as temporary employees, submitting new employment applications and working at lower wage rates. They did, however, retain seniority for benefit purposes. The maintenance employees in the new operation worked under the same supervision as they had had in the original copper tubing operation. At the time of the hearing in July 1975, only 6 of the 22[9] employees in the plastic siding operation had formerly worked in the original bargaining unit.

The Board in *Robintech* refused to accrete the plastic siding division employees into the old copper tubing unit (which no longer had any employees) even though maintenance employees in the original unit had transferred over to the new operation along with their supervisors. The Board held that the new operation in *Robintech* was essentially a new industry, designed to manufacture a new product requiring new capital investment, plant modifications, and machinery and production processes, albeit at the same site as the original bargaining unit. The Board refused to find an accretion notwithstanding that the first-line supervision in both the copper tubing and plastic siding operations was the same, that both operations were located on the same premises, and that both operations were under one overall manager.[10]

Without reiterating the relevant facts in the instant case which are heretofore set forth, I conclude and find that the similarities between this case and *Robintech, supra*, are so substantial that under the Board's decision in the latter case a finding of accretion is not warranted here.

Beyond the foregoing, and apart from whatever the initial relationship between the two operations with respect to integration of operations, differences or similarity of work skills, supervisory relationships, proximity of operations, and the like, the Board in numerous cases has been concerned about the Section 7 rights of the employees sought to be accreted. Thus, in an early case, the Board adopted the following statement of the Trial Examiner:[11]

> It happens that the Trial Examiner is disposed to appraise the relevant factors from the viewpoint, assumed, of course, of the some 115 American Emblem employees. To decide that this larger number of employees must accept as their bargaining agent one already selected by fewer than 70 employees of Worcester Stamped would appear to be, by mandate, depriving them of the statutory right accorded them as long ago as 1935 of selecting, as principals, their own bargaining agent.

In *Melbet Jewelry Co., Inc., and I.D.S.—Orchard Park, Inc.*, 180 NLRB 107, 110 (1969), the Board stated:

> We will not, however, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.[12]

Although arising in the context of the contract-bar area, the principle initially enunciated in *General Extrusion Company, Inc.*, 121 NLRB 1165 (1958), concerning representation of employees prior to attainment of a representative complement is also relevant to the case at bar. Thus, in that case the Board established the rule that a contract bars an election only if at least 30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed and 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed. A similarly related rule, and one which I think should be considered in the entire circumstances of the present case, has been developed in the context of 8(a)(2) unfair labor practice situations. The principle in question was stated by the Board in *Hayes Coal Co., Inc.*, 197 NLRB 1162, 1163 (1972), as follows:

> A determination of premature recognition, however, cannot be predicated on whether existent jobs are temporarily unfilled by reason of quit or discharge, or on a possibility that future conditions may warrant an increase in personnel, or on the basis of an increase in personnel subsequent to the granting of recognition. The correct test is whether, at the time of recognition, the jobs or job classifications designated for the operation involved are filled or substantially filled and the operation is in normal or substantially normal production.

The table reflecting the number and percentage of CFC employees who had previously worked in Die Cast for the periods relevant hereto has been previously set forth in this Decision. From this it will be observed that it was only during the month of October 1977 that former Die Cast employees constituted more than 50 percent of the total complement of the CFC work force. However, since at this point the CFC total complement was only 16 employees, it is clear that at this time neither a representative complement of CFC employees was employed nor were the CFC employees then engaged in a normal production. Indeed, at no point thereafter did the former Die Cast employees ever exceed 30 percent of the total complement of CFC employees.[13] For the month of April 1978, when a representative CFC complement appears to have been reached (116 employees), only 27 percent of them were former Die Cast employees. On June 22, 1978, the date on which it is alleged

[9] The siding operation also had the 10 maintenance employees referred to previously. The company had, at the time of the hearing, plans to retain some of the maintenance employees as permanent employees.

[10] The Board in several other cases has refused to find an accretion despite the presence of common supervision at the higher levels. *General Electric Company*, 204 NLRB 576 (1973); *The Bendix Corporation*, 168 NLRB 371 (1967); *Gould-National Batteries, Inc.*, 157 NLRB 679 (1966).

[11] *Worcester Stamped Metal Company*, 146 NLRB 1683, 1685 (1964).

[12] For related cases, see *Gould-National Batteries, Inc., supra; Renaissance Center Partnership*, 239 NLRB 1247 (1979); *Pacific Southwest Airlines* v. *N.L.R.B.*, 587 F.2d 1032 (9th Cir. 1978); *N.L.R.B.* v. *Food Employers Council, Inc.*, 399 F.2d 501 (9th Cir. 1968).

[13] And this occurred on only three monthly periods; namely, during the months of November 1977 and April and May 1979.

that the bargaining demand was made, the number of former Die Cast employees who were employed by CFC constituted 21 percent of the total CFC complement. Or, to view it from a different perspective, on that date the CFC unit exceeded the Die Cast unit by 152 (CFC) to 48 (Die Cast), a ratio of over 3 to 1.

In sum, since I have found the *Robintech* case, *supra*, to be controlling here, and since I further conclude that under applicable law and under the entire circumstances of this case the CFC employees would be deprived of their Section 7 rights if the Union were imposed upon them without an election, I find that CFC is not an accretion to the Die Cast unit. Accordingly, I find that the General Counsel has not established that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union in the alleged accreted unit. It is, therefore, recommended that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Gould, Inc., Electrical Components Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 108, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(1) and (5) of the Act as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The complaint is dismissed in its entirety.

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.